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No. 07-1524

IN THE

Supreme Court of the United States

CARLOTA COPPER COMPANY,

Petitioner,

v.

FRIENDS OF PINTO CREEK, *et al.*,

Respondents.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOR THE FEDERAL WATER QUALITY COALITION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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BRIEF OF *AMICUS CURIAE* FOR THE FEDERAL WATER QUALITY COALITION IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Federal Water Quality Coalition (the "Coalition") is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made under the federal Clean Water Act (the "CWA") (33 U.S.C. §§ 1251-1387). Coalition member entities or their members own and operate facilities located on or near waters of the United States. They are located both within the Ninth Circuit's jurisdiction, and elsewhere throughout the country. These entities operate pursuant to, or are applicants for, individual or general National Pollutant Discharge Elimination System ("NPDES") wastewater or stormwater permits issued by EPA or, if EPA has transferred NPDES permitting authority pursuant to CWA § 402(b) (33 U.S.C. § 1342(b)), by state

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1. Pursuant to Rule 37.6 of the Rules of the Court, the Coalition states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Coalition, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of such filing. Their consents are being lodged herewith.

water quality agencies.[2] Before issuing NPDES permits, EPA and state water quality agencies are required to comply with numerous CWA provisions and regulations, including 40 C.F.R. § 122.4(i) ("section 122.4(i)"), which requires permitting agencies to determine whether a new source or new discharger will cause or contribute to a violation of water quality standards. The Ninth Circuit's interpretation of section 122.4(i), if upheld and widely followed, will significantly disrupt the NPDES permitting process for Coalition members throughout the nation, as it will not only apply to mining operations that are involved in this case, but also to energy production, industrial processes, factories, businesses, construction, utilities, municipal wastewater treatment, and all the other activities that require NPDES permits. The Coalition is filing this *amicus curiae* brief because it and its members, who are involved in the above effected activities, are concerned about the deleterious impact that the Ninth Circuit decision may have on the CWA permitting process and the Coalition's members.

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2. 45 states are currently authorized to administer NPDES permit programs. *See* National Pollution Discharge Elimination System (NPDES), State Program Status (visited June 23, 2008) <http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=general>.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

The Ninth Circuit invalidated an NPDES permit for a new discharger to an impaired water subject to a total maximum daily load ("TMDL"), even though the permit contained an offset condition designed to improve water quality and ensure compliance with water quality standards. In reaching its decision, the Ninth Circuit interpreted section 122.4(i) in a manner that would effectively prevent EPA and state water quality agencies from issuing NPDES permits to new dischargers located on or near waters listed as impaired under CWA § 303(d) (33 U.S.C. § 1313(d)).[3]

Specifically, the Ninth Circuit held that under section 122.4(i), a new discharger must demonstrate that where a TMDL has been established for a CWA § 303(d) listed water, a permit may only be issued if the new discharger is able to demonstrate compliance with two conditions: subsection 122.4(i)(1), which requires a showing that there "are sufficient remaining pollutant load allocations to allow for the discharge"; and subsection 122.4(i)(2), which requires a showing that the "existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." 40 C.F.R. § 122.4(i)(1) & (2). The Ninth Circuit went on to find that the term "existing dischargers . . . subject to compliance schedules" under

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3. The Ninth Circuit decision is reported as *Friends of Pinto Creek, et al. v. EPA*, 504 F.3d 1007 (9th Cir. 2007).

section 122.4(i)(2) applied not only to point sources (both permitted and non-permitted) into the relevant water body, but could also apply to nonpoint sources where compliance schedules for point sources were insufficient to bring the water body in compliance with applicable water quality standards.[4] Thus, under the Ninth Circuit decision, to obtain an NPDES permit, a new discharger into an impaired water subject to a TMDL would potentially need to persuade nonpoint sources to agree to establish compliance schedules in order to ensure that the water segment was brought into compliance with applicable water quality standards.

The Ninth Circuit's inclusion of nonpoint sources within "existing dischargers . . . subject to compliance schedules" in section 122.4(i)(2) is not supported by the language and policy of the CWA, and will have a negative impact on the administration of the NPDES program. If section 122.4(i)(2) is interpreted to require applicants for permits to reach agreements on compliance schedules for nonpoint sources if schedules for point sources are insufficient to bring the water body into compliance with water quality standards, it will be virtually impossible for new dischargers to obtain permits. Nonpoint sources are generally not regulated and come from diffuse sources that are difficult to measure and control, making it extremely problematic for an applicant for a permit to ensure the nonpoint

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4. Point sources are sources that discharge pollutants through defined conveyances such as pipes or channels, whereas nonpoint sources are more diffused sources of pollutants such as runoff. 33 U.S.C. § 1362(14); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140, n.4 (10th Cir. 2005).

sources comply with water quality standards. Indeed, the CWA does not regulate nonpoint sources through NPDES permits, and leaves the responsibility for nonpoint source regulation to the states.

Moreover, the purpose of TMDLs is to allow for effective water quality management of discharges into a particular water segment. The Ninth Circuit decision, however, will obstruct using TMDLs for the management of discharges and will instead make it practically unattainable for new dischargers to obtain permits in waters subject to a TMDL, because such a discharger will now potentially be required to ensure that all sources of pollution, including nonpoint sources, must either be in compliance with water quality standards or be subject to a compliance schedule for a water segment. Such a formidable burden will dramatically impair a new discharger's ability to obtain a permit, and may require existing point sources to establish restrictive compliance requirements to compensate for pollution from difficult-to-control nonpoint sources. The petition for a writ of *certiorari* should be granted because of these potential national impacts on the NPDES program as a result of the Ninth Circuit's ruling.

The Ninth Circuit also held that there is no language in the CWA or its regulations that provides for an exception to section 122.4(i) to allow for EPA or state water quality agencies to consider a decrease in an existing discharge to offset a new discharge into a water listed as impaired for a pollutant under CWA § 303(d). This interpretation of section 122.4(i) improperly constrains the EPA's and state water quality agencies' discretion and flexibility to issue permits for discharges

into CWA § 303(d) impaired waters, as permitting agencies should be allowed to consider net environmental benefits, such as would occur through offsets of the impacts of new discharges with equivalent or greater reductions from existing discharges. EPA's offset approach is vital to incrementally restoring the nation's waters, is entirely consistent with the TMDL program as designed by Congress and implemented by EPA, and is necessary to accommodate population growth, economic development and replacement or enhancement of wastewater infrastructure. Denying permitting agencies the ability to consider offsets for new discharges into an impaired water will stifle the ability of permitting authorities and dischargers to develop new and more efficient facilities, whose discharges could be offset by decreasing discharges from older, outdated facilities, and which would allow for significant environmental benefits, such as decreasing total discharges into a water body. If upheld and widely followed, the Ninth Circuit's decision will confuse the process for obtaining permits for new dischargers in impaired waters, impose new and in some cases impossible prerequisites for such permits, and chill trading and offset programs that are designed to promote incremental environmental improvement, consistent with the language and policy of the CWA. Again, the Ninth Circuit's decision will have a national impact on the NPDES program that conflicts with the purpose of the CWA.

Because of the above national impacts on the administration of the NPDES program that directly bear on, among many others, the Coalition's diverse members as a result of the Ninth Circuit's decision, as well as the conflict created by the Ninth Circuit's

decision with the Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), and the Minnesota Supreme Court's decision in *In re: Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007) – as thoroughly discussed in Carlota Copper's petition for writ of *certiorari* – the Coalition and its members have an interest in ensuring the proper application of section 122.4(i), and support Carlota Copper's petition for writ of *certiorari* seeking reversal of the Ninth Circuit's decision.

ARGUMENT

I. Statutory framework of the CWA and NPDES program.

The objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA prohibits any person from discharging any pollutant into waters of the United States from a point source unless the discharge complies with the CWA's statutory requirements. 33 U.S.C. § 1311(a). A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Conversely, the CWA does not define the term nonpoint source. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140, n.4 (10th Cir. 2005); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). However, a nonpoint source

"is commonly understood to be pollution arising from dispersed activities over large areas that is not traceable to a single, identifiable source or conveyance." *Sierra Club*, 421 F.3d at 1140, n.4; *League of Wilderness Defenders*, 309 F.3d at 1184 (A nonpoint source "is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits."). Section 402 of the CWA ("CWA § 402") authorizes EPA to issue NPDES permits for the discharge of pollutants from point sources, provided the discharge meets particular statutory requirements. 33 U.S.C. § 1342(a).

The CWA recognizes "that the States should have a significant role in protecting their own natural resources." *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). As part of the states' primary responsibilities for controlling pollution, the CWA requires states to develop water quality standards for all water bodies within their borders to further the goals of the CWA. 33 U.S.C. § 1313(a). Under the CWA, water quality standards, which states promulgate and then submit to EPA for approval, must have two components: (1) one or more "designated uses of the navigable waters involved;" and (2) "water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A).

In issuing an NPDES permit, EPA or a state water quality agency must also comply with the CWA's attendant regulations as necessary to achieve water quality standards. *See* 40 C.F.R. § 122.4; 40 C.F.R. § 122.44. Section 122.4(i) provides in full:

> No permit may be issued:
>
> . . .
>
> (i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment

> into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2) is to be included in the fact sheet to the permit under § 124.56(b)(1) of this chapter.

40 C.F.R. § 122.4(i).

The CWA also imposes technology-based limitations that "reduce levels of pollution by requiring a discharger to make equipment or process changes, without reference to the effect on the receiving water." *City of Arcadia v. EPA*, 411 F.3d 1103, 1105 (9th Cir. 2005). With both technology-based limitations and water quality standards in place, the CWA also requires states to identify water segments where technology-based effluent limits are insufficient to achieve the applicable water quality standards. 33 U.S.C. § 1313(d)(1)(A). A water body that is not meeting a state water quality standard is called a "water quality limited segment" or impaired water. 40 C.F.R. § 130.2(j). Once a water quality limited segment is identified, the states are required to "establish a priority ranking for such waters, taking into

account the severity of the pollution and the uses to be made of such waters." 33 U.S.C. § 1313(d)(1)(A). The list of these impaired waters is known as the "303(d) list." *City of Arcadia*, 411 F.3d at 1105.

Once a state identifies a segment as impaired or "water quality limited" and places the impaired water on the state's 303(d)(1) list, the CWA requires the state to develop a TMDL for that segment. 33 U.S.C. § 1313(d)(1)(C). A TMDL sets forth the total amount of a pollutant from point sources, nonpoint sources, and natural background that a water quality limited segment can tolerate without violating water quality standards. 40 C.F.R. § 130.2(i).[5] In essence, a "TMDL is not self-enforcing, but serves as an informational tool or goal for the establishment of further pollution controls." *City of Arcadia*, 411 F.3d at 1105.

5. States must also identify waters not placed on their CWA § 303(d)(1) lists and "estimate" TMDLs for pollutants in those waters. 33 U.S.C. § 1313(d)(3). The CWA does not provide any requirement that the EPA approve the waters identified under CWA § 303(d)(3) or the TMDLs for those waters. It is not clear if the waters in question belong on the list required under CWA § 303(d)(1) or CWA § 303(d)(3).

II. The Ninth Circuit's interpretation of section 122.4(i)(2) as potentially applying to nonpoint sources will effectively prohibit the issuance of permits for new dischargers into waters subject to TMDLs.

The Ninth Circuit interpreted section 122.4(i)(2) and ruled that if compliance schedules for permitted and non-permitted point sources could not ensure compliance with the applicable water quality standard, "then a permit cannot be issued unless the state or Carlota agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards." *Friends of Pinto Creek, et al. v. EPA*, 504 F.3d 1007, 1014 (9th Cir. 2007). The Ninth Circuit's holding that section 122.4(i)(2) requires new dischargers into impaired waters subject to TMDLs to establish schedules to bring nonpoint sources into compliance with water quality standards, if compliance schedules for point sources are insufficient, is unprecedented and ignores the language and intent of the CWA, fails to give deference to EPA's interpretation of its own regulations, and fundamentally misconstrues the nature of nonpoint sources. As a practical matter, the Ninth Circuit's interpretation will substantially frustrate the ability of permitting agencies to issue permits for new discharges into waters subject to TMDLs and, in turn, will negatively affect the administration of the NPDES program. The Ninth Circuit's decision, if upheld, would have the effect of requiring permit applicants, like Petitioner Carlota Copper, to coax nonpoint sources to accept enforceable schedules for their otherwise unregulated discharges. It also would have the effect of punishing point sources for the impacts from illegal point

sources and other nonpoint sources over which they may have no meaningful control.

The Ninth Circuit's expansive and novel reading of section 122.4(i) is not supported by the language or policy of the CWA, and will severely disrupt administration of the NPDES program. Consider, for example, a creek with ten existing point source dischargers (two of which are discharging illegally) and an additional ten nonpoint sources. If the creek is subject to a TMDL that contains a reservation for future growth, then a new discharger should be able to obtain an NPDES permit that is consistent with this reservation, as well as the other assumptions and requirements of the TMDL. Under the Ninth Circuit's interpretation, however, this new discharger will be ineligible for permit coverage unless and until all of the other point sources (even the illegal sources) obtain permits with enforceable compliance schedules, and if those reductions are insufficient to ensure compliance with water quality standards, then the new discharger will continue to be ineligible unless and until the nonpoint sources are somehow compelled to accept enforceable compliance schedules. This will have the effect of an immediate moratorium on permitting for new dischargers, since it may take several permit cycles (*i.e.*, 5-10 years or more) to impose TMDL requirements in NPDES permits for existing dischargers, and even longer to enforce illegal discharges and coax nonpoint sources to accept enforceable schedules for their otherwise unregulated discharges.

An examination of the language of the CWA demonstrates that section 122.4(i)(2) cannot apply to nonpoint sources. The language of section 122.4(i)(2) states "[t]he *existing dischargers* into that segment are subject to compliance schedules . . ." 40 C.F.R. § 122.4(i)(2) (emphasis added). The CWA defines "discharge" as "a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). The CWA then defines "discharge of a pollutant" as "(A) any addition of any pollutant to navigable waters from any *point source*, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any *point source* other than a vessel or other floating craft." 33 U.S.C. § 1362(12) (emphasis added). As a result, section 122.4(i)(2) only applies to existing discharges of pollutants to navigable waters from a point source. The CWA specifies that nonpoint sources are not included within the term "discharges," thus, they should not be included within the term "existing dischargers" in section 122.4(i)(2). Further confirming this point, the CWA regulations define the term "schedule of compliance" as a "schedule of remedial measures included in a '*permit*' . . ." 40 C.F.R. § 122.2 (emphasis added). This language demonstrates that "compliance schedules" only apply to permitted point source discharges and not nonpoint source discharges.

Section 122.4(i)(2) can only apply to point source dischargers because EPA's authority under the CWA is limited to promulgating regulations, such as section 122.4(i), to apply to point sources. *See NRDC v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); *see also Oregon Natural Resources Council v. U.S. Forest*

Service, 834 F.2d 842, 849 (9th Cir. 1987) ("Point sources are subject to direct federal regulation and enforcement under the Act . . . Nonpoint sources, because of their very nature, are not regulated under the NPDES."); *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) ("Unlike point source pollutants, the EPA lacks the authority to control non-point source discharges through a permitting process . . .") Instead, the CWA provides that regulation of nonpoint sources will be left to the states. *Oregon Natural Resources Council*, 834 F.2d at 849 ("Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages states to develop area-wide waste treatment management plans."). Thus, EPA could not have intended for section 122.4(i)(2) to apply to nonpoint source dischargers.

Moreover, even assuming *arguendo* that the language of section 122.4(i)(2) is ambiguous as to whether it includes nonpoint sources, the Ninth Circuit failed to defer to EPA's interpretation of its own regulation. The seminal case of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984) established the principle that courts must give effect to an agency's reasonable interpretation of an ambiguous statute. This rule was subsequently extended to apply to the interpretation of ambiguous regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Accordingly, EPA's interpretation of its own regulations governing the NPDES program is entitled to deference. *Arkansas v. Oklahoma*, 503 U.S. 91, 110, 112 (1992); *Auer*, 519 U.S. at 461.

In briefing before the Ninth Circuit and the Environmental Appeals Board ("EAB"), EPA explained that its interpretation of "existing dischargers" in section 122.4(i)(2) only applied to point sources. *See In re: Carlota Copper Co.*, 2004 EPA App. LEXIS 35, *201-202 (EAB, 2004) (In finding that EPA's interpretation of section 122.4(i)(2) was not erroneous, the EAB held "[t]he requirement in section 122.4(i)(2) can only apply to point sources because under the CWA the Agency only has authority to promulgate regulations for point sources . . . and as previously noted, the regulation of nonpoint source discharges is left to the states.") The Ninth Circuit should have deferred to EPA's interpretation of its own regulation, and found that section 122.4(i)(2) only requires compliance schedules for point sources. Its failure to do so offends *Auer* principles.

If upheld, the Ninth Circuit's decision will make it virtually impossible for new dischargers of a particular pollutant to obtain permits in waters subject to a TMDL for such a pollutant. According to the Ninth Circuit, any new discharger seeking a permit for discharges into a water body subject to a TMDL will be required to establish schedules for all point sources of pollution to bring a water body into compliance with water quality standards, and where that is insufficient, compliance schedules will also be required of nonpoint sources. Such a burden for a new discharger will be almost impossible to overcome, due to the difficulty of controlling nonpoint sources. Unlike an easily identifiable point source, a nonpoint source involves "pollution arising from dispersed activities over large areas that is not traceable to a single, identifiable source or conveyance."

Sierra Club, 421 F.3d at 1140, n.4. "Because it arises in such a diffuse way, it is very difficult to regulate through individual permits." *League of Wilderness Defenders*, 309 F.3d at 1184. As explained by the Eleventh Circuit:

> In addition to originating from point sources, pollution also comes from non-point sources, such as runoff from farmlands, mining activity, housing construction projects, roads, and so on. Non-point sources cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point.

Meiburg, 296 F.3d at 1025. As a result of the difficulty of measuring and controlling nonpoint sources and, thus, the difficulty in implementing schedules for bringing them into compliance with water quality standards, the ability of a new discharger to obtain a permit for a new discharge into a TMDL water will be dramatically impaired.

A TMDL is a tool for EPA and state water quality agencies to use to effectively manage water quality and discharges from both point and nonpoint source pollution. Specifically, a TMDL sets forth the total amount of a pollutant from point sources, nonpoint sources, and natural background that a water quality limited segment can tolerate without violating water quality standards. 40 C.F.R. § 130.2(i). TMDLs consist of wasteload allocations[6] for point sources discharging

6. Wasteload allocations are defined as "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." 40 C.F.R. § 130.2(h).

into the impaired segment and load allocations[7] for nonpoint sources and natural background. *Id.* The purpose of TMDLs is to organize these load allocations so that they can be managed to effectively control the water quality of the impaired segment, and allow for new dischargers when sufficient allocations for the dischargers are in place. The Ninth Circuit's decision, however, stifles this purpose, and instead of promoting the effective management of water quality, it only suppresses new dischargers from obtaining permits.

Moreover, under the CWA, the administrative tools for controlling impacts from point source and nonpoint sources are dramatically different. Point sources are subject to NPDES permitting requirements that must be consistent with the assumptions and requirements of any available TMDL. Nonpoint sources are subject to no similar requirements. In fact, they remain largely unregulated, except perhaps at the state and local level under state-specific laws or policies. The burden imposed by the Ninth Circuit's decision will make it close

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7. Load allocations are defined as

> The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.

40 C.F.R. § 130.2(g).

to impossible for new dischargers to obtain NPDES permits from EPA or a state water quality agency for waters subject to TMDLs, thus limiting a permitting authority's ability to manage water quality.

Further exacerbating the impact of the Ninth Circuit's decision are the number of waters impaired by nonpoint sources in the United States where the decision would prevent or impede issuance of NPDES permits for new facilities or expansions of existing facilities. On its website, EPA provides statistics as to the scope of CWA § 303(d) impaired waters:

> Over 40% of our assessed waters still do not meet the water quality standards states, territories, and authorized tribes have set for them. This amounts to over 20,000 individual river segments, lakes, and estuaries. These impaired waters include approximately 300,000 miles of rivers and shorelines and approximately 5 million acres of lakes — polluted mostly by sediments, excess nutrients, and harmful microorganisms. An overwhelming majority of the population - 218 million - live within 10 miles of the impaired waters.

See Overview of Current Total Maximum Daily Load - TMDL - Program and Regulations (visited June 23, 2008) <http://www.epa.gov/owow/tmdl/overviewfs.html>. In addition, the Ninth Circuit's decision would negatively effect general permits that regulate certain industries. These permits cover hundreds, if not thousands, of minor sources in particular categories that

allow for efficient and managable regulation. Applying the Ninth Circuit's decision to these minor sources, however, would require individual source considerations, in direct conflict with the purpose of general permits, and would completely eviscerate the value of such permits, putting an effective halt on the activities of general permittees, such as construction, thus having a direct and broad economic impact. Because of the broad adverse impact that the Ninth Circuit's decision will have on the NPDES permitting process, including the Coalition's members who are involved in broad activities throughout the United States, such as energy production, industrial processes, factories, businesses, construction, utilities, and municipal wastewater treatment, the Court should grant the petition for writ of *certiorari*.

III. The Ninth Circuit's interpretation of section 122.4(i) as not allowing for offsets will negatively affect permitting authorities' ability to protect and restore the nation's waters.

The Ninth Circuit decision also held that "there is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water." *Friends*, 504 F.3d at 1012. This holding interprets section 122.4(i) in a manner that dramatically restricts a permit-issuing agency's discretion in making permitting decisions under the CWA.

During the permitting process, EPA found that "the copper loadings into Pinto Creek attributable to the Gibson Mine exceed Carlota's projected loadings

and that the partial remediation of the Gibson Mine will offset any discharges from Carlota's facilities." *In re: Carlota Copper Co.*, 2004 EPA App. LEXIS 35, at *133. Thus, "rather than 'causing or contributing' a degradation, Carlota will be improving Pinto Creek's water quality, or at the very least maintaining water quality." *Id.* at *197. The Ninth Circuit decision, however, voids this potential offset and allows the Gibson mine to continue discharging copper into Pinto Creek in an amount in excess of Carlota Copper's potential new copper discharges. This rejection of the offset approach directly conflicts with the CWA's objective of improving and restoring the quality of the nation's water, as it will stifle trading and offset programs that were established to promote environmental improvement. Moreover, the Ninth Circuit's rejection of EPA's use of an offset fails to grant deference to EPA's interpretation of a regulation its administers in conflict with the Court's decision in *Auer*. *See* 519 U.S. at 461. The Ninth Circuit's interpretation of section 122.4(i) as not allowing offsets stifles the ability of permitting authorities and new dischargers to develop new and more effective facilities to deal with pollutants in an impaired water, because the construction of any improved facilities will not be possible. Such a result is not envisioned by the CWA. 33 U.S.C. § 1251(a).

The Ninth Circuit's decision unduly restricts the EPA's and state water quality agencies' ability to protect the nation's waters, and does so in a way that is not supported by the CWA. Under the Ninth Circuit's reasoning, section 122.4(i) bars a permitting authority from allowing new discharges into a CWA § 303(d) impaired water body where there may be net

environmental benefits. EPA and state permitting authorities, however, need the discretion and flexibility to consider various factors when making permitting decisions under the CWA. For state permitting agencies, the CWA grants the authority to develop water quality standards, as well as control over permitting discharges to enforce such standards. The Ninth Circuit's failure to honor that autonomy is in error and should be reviewed by the Court.

To illustrate the discretion given to permitting agencies under the CWA, EPA's NPDES regulations provide that in assessing whether to issue a permit and determining whether a discharge has the reasonable potential to cause or contribute to an exceedance of a water quality standard, a permitting authority has the discretion to take into account other discharges into the same water body and the net effects of such discharges:

> (ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

40 C.F.R. § 122.44(d)(1)(ii). This language gives a permitting authority significant flexibility in issuing a permit, under

which the permitting authority can examine "existing controls on point and nonpoint sources of pollution." *Id.* In other words, in taking into account beneficial existing pollution controls on a water body, a permitting authority has the discretion to find that there will not be a reasonable potential to exceed, and, therefore, no permit limit is needed. *Id.* This regulation provides an example of the discretion granted to a permitting authority under the CWA's regulations, which will be abrogated by the Ninth Circuit's restrictive reading.

If the Ninth Circuit's decision is followed, EPA and state permitting authorities will not be able to use a necessary flexible approach that allows consideration of important issues such as environmental benefits or public health. Indeed, under the Ninth Circuit's ruling, permitting authorities will not be able to issue permits for the replacement of failing facilities with new or updated facilities, because the permitting authorities will have no flexibility to consider offsets and net environmental benefits involved with the increased efficiency of a replacement facility's water treatment processes, a failing facility's existing discharges, and the overall net benefit to the environment. For example, the Ninth Circuit's decision could make it impossible for a permitting authority to issue a permit to install new sewer systems for dischargers in previously unsewered areas (*e.g.*, areas currently using septic tanks). The Ninth Circuit's decision is inconsistent with the CWA's objectives of cleaning the nation's waters, and should be reviewed and reversed.

In the case at bar, the impairment in the water segment from Carlota Copper's potential discharges will be offset by the remediation of the Gibson mine, leading

to a net decrease of copper discharges. *In re: Carlota Copper Co.*, 2004 EPA App. LEXIS 35, at *189 ("Carlota will not cause or contribute to the violation of water quality standards but rather will improve existing conditions because the reductions that will result from its activities are greater than the projected discharges.") In such circumstances, permitting agencies should have discretion to allow a new discharge into a water, where there will be a net environmental benefit consistent with the goals of the CWA. The Ninth Circuit's decision should be reviewed and reversed.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant the Petition for writ of *certiorari*.

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